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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-903

AALCO WRECKING COMPANY, INC.,
Petitioner,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation; MILLER'S MUTUAL INSURANCE COMPANY, a Corporation; AMERICAN MOTORISTS INSURANCE COMPANY, a Corporation; NORTHWESTERN MUTUAL INSURANCE COMPANY, a Corporation; PENNSYLVANIA NATIONAL MUTUAL INSURANCE COMPANY, a Corporation; THE GENERAL INSURANCE CORPORATION, a Corporation; and COMMERCIAL UNION INSURANCE COMPANY OF AMERICA, a Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. .. ..

AALCO WRECKING COMPANY, INC.,
Petitioner,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation; MILLER'S MUTUAL INSURANCE COMPANY, a Corporation; AMERICAN MOTORISTS INSURANCE COMPANY, a Corporation; NORTHWESTERN MUTUAL INSURANCE COMPANY, a Corporation; PENNSYLVANIA NATIONAL MUTUAL INSURANCE COMPANY, a Corporation; THE GENERAL INSURANCE CORPORATION, a Corporation; and COMMERCIAL UNION INSURANCE COMPANY OF AMERICA, a Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Petitioner, Aalco Wrecking Company, Inc., a corporation, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on August 7, 1972, in Fireman's Fund Insurance Company, a Corporation; Miller's Mutual Insurance Company, a Cor-

poration; American Motorists Insurance Company, a Corporation; Northwestern Mutual Insurance Company, a Corporation; Pennsylvania National Mutual Insurance Company, a Corporation; The General Insurance Corporation, a Corporation; and Commercial Union Insurance Company of America, a Corporation v. Aalco Wrecking Company, Inc., a Corporation, No. 20,552.

OPINIONS IN THE CASE

The Opinion of the Court below, entered on August 7, 1972, has not been officially reported. A copy of said Opinion is appended hereto as Appendix "D". A dissenting Opinion to the Order of the Court of Appeals for the Eighth Circuit denying a petition for rehearing filed by Petitioner is unreported. It appears as Appendix "F".

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered August 7, 1972, and appears as Appendix "D" (p. A-8). A petition for rehearing with suggestions for rehearing en banc was timely filed by Petitioner in the Court below pursuant to Rule 40 of the Federal Rules of Appellate Procedure. That petition was denied September 26, 1972. The Order denying said petition for rehearing appears as Appendix "E" (p. A-23). The dissenting Opinion from that denial by Judge Mehaffy and Chief Judge Matthes was filed on October 16, 1972. It is set forth as Appendix "F" (p. A-24).

The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

1. Does it lie within the power of the United States Court of Appeals for the Eighth Circuit arbitrarily to abrogate the time honored, universal rule that it is the power and inviolate function of the trial court to grant a

new trial; thereby arrogating unto itself the power to try that ruling de novo, absent an unequivocal and specific finding that the trial court committed a clear and patent abuse of its judicial discretion?

2. In the event the Petition is granted, the Petitioner will also urge the following question: Whether the decision of the United States Court of Appeals for the Eighth Circuit reviewing the grant by the trial court of judgment n.o.v. was proper under the evidence presented.

STATEMENT OF THE CASE

This action was brought against Petitioner, Aalco Wrecking Company, Inc., a small, family-owned company which operates in the metropolitan area of St. Louis, Missouri. Plaintiffs-Respondents, consisting of seven insurance companies, filed their Complaint in the United States District Court for the Eastern District of Missouri, Eastern Division. The Complaint alleged that Petitioner was negligent in failing to exercise reasonable care and/or to perform certain of its work in accordance with acceptable standards of the demolition and wrecking industry, enumerating these alleged standards; that as a direct and proximate result thereof, personal property and fixtures owned by Plaintiffs-Respondents' insureds, were damaged or destroyed by fire and that they were entitled to subrogation against Petitioner for that loss.

Jurisdiction of the United States District Court aforesaid was based upon diversity. That allegation was denied by Petitioner.

The case was tried to a jury, which returned individual verdicts for each plaintiff aggregating in total $215,277.53. Petitioner timely filed its Motion to Set Aside Verdict and Judgment in accordance with its Motion for Directed Verdict at the close of all the evidence, or in the Alterna-

tive for a New Trial (App. A, p. A-1). Petitioner's Motion was granted August 14, 1970. The trial court entered a new judgment in favor of Petitioner and against all Plaintiffs (App. B, p. A-5). Petitioner's Alternative Motion for New Trial was also granted on ten (10) specified grounds (App. B, p. A-5). Judgment was entered accordingly on August 17, 1970 (App. C, p. A-7).

Respondents appealed to the United States Court of Appeals for the Eighth Circuit. Thereafter, on August 7, 1972 (App. D, p. A-8), a three judge panel of that Court reversed outright the District Court's decision with direction to enter judgment for the Plaintiffs in accordance with the original verdict.

Petitioner sought rehearing before the United States Court of Appeals for the Eighth Circuit *en banc* or in the alternative before the Panel through a timely filed Petition. Rehearing was denied September 26, 1972 (App. E, p. A-23). But on October 16, 1972, a dissent from the denial of rehearing en banc was filed (App. F, p. A-24). The mandate of the Court of Appeals was stayed on October 20, 1972, pending this Petition to the Court (App. G, p. A-31).

1. **Facts relating to the issues presented.**

In late April 1965, Petitioner, under contract with the State Highway Department of Missouri, commenced removal of thirteen buildings located in a complex in downtown St. Louis. In early August, 1965, the job site was cleared with the exception of four 7 story, brick warehouse type buildings with interior construction of steel girders and wood floors. These were bounded on the west by two railroad tracks and various spurs. Across these tracks to the west were the six buildings occupied partially by Respondents' insureds. All had common walls, giving the appearance of a single structure. Across the sepa-

rating railroad tracks were two covered bridges, of frame construction. These extended into the buildings being removed by Petitioner. They were not part of the property condemned for highway purposes, and not part of the premises to be removed by Petitioner. They were used by Respondents' insureds and by the owner of the premises.

In the early morning of August 4, 1965, a fire started. Its cause has never been determined. This is admitted by Respondents. Its exact starting point was unknown to Respondents' witnesses. Petitioner's evidence, however, placed the starting point of the fire within the area occupied by Respondents' insured and outside the work area controlled by Petitioner.

The Fire Department of St. Louis was first notified at 2:31 A.M. by Lee Anielak, an employee of the Terminal Railroad Association. After giving the alarm, Anielak proceeded immediately to the scene. He saw the fire was on the northern-most covered bridge. The only expert witness to testify at the trial, who examined the area immediately after the fire, placed the inception of the blaze on this bridge, where Anielak testified he observed it. Those members of the fire department, first arriving on the scene, who approached the locus of the blaze, confirmed this testimony.

Initial involvement of all of these structures was immediate. In a matter of minutes, the fire was out of control. It spread to the structure occupied by Respondents' insureds and damaged the contents thereof. Further damage was occasioned by smoke and water.

It was not until four years later, that the initial Complaint was filed in the United States District Court. In April 1970, an Amended Complaint was filed. Trial by

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jury was had. Verdict for Respondents was entered on May 6, 1970.

In the trial, Respondents' evidence was that the area being worked upon by Petitioner was large; the buildings thereon during the course of Petitioner's operation were vacant; Petitioner did not provide a watchman during non-working hours; prior to Petitioner entering upon the premises and commencing work, a portion of the area had been open to transients; under one of the buildings remaining, on the ground level, there ran a railroad spur which had never been an enclosed part of the building; immediately above this spur was a steel and concrete truck loading area with nothing to secure; and that immediately prior to the fire there was standing a remnant of a building consisting of a wall with supporting girders.

Petitioner's evidence was that security of the premises within its control was possible, the buildings were secured, and no transients or vandals entered upon the premises during non-working hours. It was uncontroverted that there were no violations of the Building Code of the City of St. Louis pertaining to Petitioner's operations. This fact was established by testimony that regular inspections of the Building Commissioner's office revealed none. No violations were reported to the Building Commissioner's office by police or fire departments. In addition, there was no evidence of custom or practice of the industry requiring Petitioner to provide a watchman during non-working hours under the circumstances existing. On two occasions, workmen of Petitioner called St. Louis Police, who apprehended unauthorized persons on the premises.

The case was tried and presented to the jury on the theory that it was not reasonably possible to secure the buildings being demolished by Petitioner; that Petitioner provided no watchman during non-working hours; that

the failure to so employ a watchman was negligence; that as a direct result thereof, there was a delay in discovering the fire and that as a direct result of the delay, the fire spread and caused damage to Respondents' insureds.

There is no evidence suggesting the theory that delay in reporting the fire was the proximate cause of the loss, except the speculation of Captain Klein of the fire department. This testimony was timely objected to on the ground it was speculative and a mere conclusion. The objection was erroneously overruled. The error on the ruling was specified by the trial court as one of the grounds upon which new trial was granted (App. B, p. A-5, App. A, p. A-3).

As clearly indicated in the dissent filed by Judge Mehaffy and Chief Judge Matthes (App. F, p. A-27), evidence of loss of the Respondents' insureds was wholly inadequate. In one instance, goods for which losses were claimed were repaired and sold for an amount in excess of their total cost and in excess of the amount paid. In another, undamaged goods, although salvageable, were not taken into account in reducing the amount claimed as a loss. Equipment and machinery for which loss was claimed was kept by individual tenants and used by them for their original purpose. This resulted in Respondents recovering where no loss had occurred to their subrogors. The discrepancy between the evidence and the amounts awarded by the jury amounted to many thousands of dollars.

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REASONS FOR GRANTING THE WRIT

1. The Decision Entered by the United States Court of Appeals for the Eighth Circuit Is in Direct Conflict With the Decisions of This Court.

The Decision of the Panel is hostile to the decisions of this Court. If allowed to stand without hearing, it will void a long established precedent.

The principle is stated by Justice Brandeis in **Fairmount Glass Works v. Cub Fork Coal Co.**, 287 U.S. 474 (1933), at p. 481:

> "The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions: * * * **The rule precludes likewise a review of such action by a circuit court of appeals.**" (Emphasis supplied.)

The long line of decisions referred to remains continuous and unbroken. **Montgomery Ward & Co. v. Duncan** (1940), 311 U.S. 243; **United States v. Socony Vacuum Oil Co.** (1940), 310 U.S. 150; **United States v. Johnson** (1946), 327 U.S. 106; **Cone v. West Virginia Pulp & Paper Co.** (1947), 330 U.S. 212; **Neely v. Martin K. Eby Construction Co.** (1967), 386 U.S. 317.

The Decision here in addition to being in direct conflict with the foregoing cases, impinges upon the function and discretion of a trial judge in a manner not intended by this Court. The action of the Panel presents an issue of great public importance affecting trial procedures in the district courts of the United States, and further destroys the judicial discretion properly vested in the trial court in derogation of the provisions of Rule 50(b), (c) and Rule 59(a), Federal Rules of Civil Procedure, 28 U.S. C.A., promulgated by this Court.

2. **The Decision of the Panel Here Is in Direct Conflict With Prior and Controlling Decisions in the Eighth Circuit Itself.**

Petitioner's Motion for New Trial was addressed to the judicial discretion of the trial judge. The rule of the Eighth Circuit is clear that the exercise of such discretion will not be reversed except for clear abuse, **Altrichter v. Shell Oil Co.** (8th Cir. 1959), 363 F2d 377; **Bates v. Hensley** (8th Cir. 1969), 414 F2d 1006, or unless there has been patent abuse of that discretion, **Silverthorn v. Hennigan** (8th Cir. 1971), 439 F2d 704. See also **Bankers Life & Casualty Co. v. Kirtley** (8th Cir. 1962), 307 F2d 418.

The Panel here did not advance one single reason, matter of evidence, or give one example of a "clear", "patent" or "strong showing" of abuse of discretion in the trial court. They did not make such a finding. They held solely "* * * it was abuse of discretion to grant a new trial" (App. D, p. A-22) on the naked statements that:

(1) There was no significant weight factor favoring the defendant;

(2) The Panel was hard pressed to say that a miscarriage of justice had taken place in the trial;

(3) It could not approve another "time consuming and costly trial" without better justification;

(4) Courts should be sensitive to, or try to avoid crowded dockets;

(5) No good purpose would be served by a second trial (App. D, p. A-22).

To reach their result on the basis of the foregoing is inconceivable. The use of these pronouncements is unwarranted to void every decision rendered heretofore and to

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usurp a basic function of the trial court and so appropriate to itself a function heretofore denied it by this Court and by the rule of the Eighth Circuit. Such a practice would take the place of the alternative granting of a new trial which latter would be rendered defunct were a hearing not granted by this Court. It would considerably increase the workload of the appellate court for the only means by which parties could be assured of retrial if, in the opinion of the trial judge, they were so entitled, would be the grant of motion for directed verdict at the close of all the evidence.

3. **The Decision Entered by the Panel Here Is in Direct Conflict With the Decisions of Other Circuits.**

As there is no showing here of clear or patent abuse in the action of the trial judge, nor any finding of special, unusual or exceptional circumstances, the decision of the United States Court of Appeals for the Eighth Circuit is in direct conflict with the decision of other Courts of Appeal:

(a) It is in conflict with the decisions of the Court of Appeals for the District of Columbia Circuit:

Law v. Virginia Stages Lines, Inc. (1971), 444 F2d 990.

(b) It is in conflict with the decisions of the Court of Appeals for the Second Circuit:

Binder v. Commercial Travelers Mutual Accident Association of America (1948), 165 F2d 896;

Portman v. American Home Products Corp. (1953), 201 F2d 847.

(c) It is in conflict with the decisions of the Court of Appeals for the Fourth Circuit:

Aetna Casualty & Surety Co. v. Yeatts (1941), 122 F2d 350;

Williams v. Nichols (1959), 226 F2d 389.

(d) It is in conflict with the decisions of the Court of Appeals for the Fifth Circuit:

Hampton v. Magnolia Towing Co. (1964), 338 F2d 303;
Telfair v. Zim Israel Navigation Co. (1970), 428 F2d 127.

(e) It is in conflict with the decisions of the Court of Appeals for the Sixth Circuit:

Turner v. United States (1956) 229 F2d 944;
Trice v. Commercial Union Assurance Co. (1964) 334 F2d 673;
Cutter v. Cincinnati Union Terminal Co. (1966) 361 F2d 637.

(f) It is in conflict with the decisions of the Court of Appeals for the Seventh Circuit:

Daffinrud v. United States (1944) 145 F2d 724.

(g) It is in conflict with the decisions of the Court of Appeals for the Ninth Circuit:

Moist Cold Refrigerator Co., Inc. v. Lon Johnson Co. Inc. (1957) 249 F2d 246.

4. The Decision of the Panel Assumes a New Function and Creates an Additional Burden for the Court of Appeals. Inherent Therein Is the Assumption That the Court Will Now Try Each Case De Novo in Which a Motion for New Trial Is Granted.

The discretion vested in the trial judge to grant a new trial is broader than in almost any other situation. It is frequently exercised. It has not resulted in unreasonably crowded court dockets.

In the United States District Court for the Eastern District of Missouri, Eastern Division, litigants may go to trial within sixty (60) days after the matter is at issue provided their attorneys are not dilatory. This District

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is noted throughout the Country for the current state of its docket.

Contrast this to the fact that the instant cause was argued before the Panel on October 18, 1971. Decision was not entered until August 7, 1972. If the principle established here is allowed to stand, this could well become the rule rather than the exception.

If every transcript and Appendix in cases of like nature are required to be searched by the Court of Appeals, it will create delay which in itself constitutes miscarriage of justice. It requires the appellate court to place itself in the position of the trial court in weighing the evidence, determining credibility of witnesses, believing or disbelieving them, and deciding the true interest of justice based upon the dry appellate record. Such is not the role of the appellate court.

By allowing the Decision of the Panel to stand without hearing by this Court, the result will be that the Court of Appeals will assume the burden and function of the trial judge. It will result in the over-crowding of the docket of the Court of Appeals for the Eighth Circuit, create additional delay and lead to miscarriage of justice for parties litigant. This result is hostile to that which is sought to be accomplished by this Court.

If the objective of aborting this sound principle be to expedite the administration of justice, it is clear that the result would be just the opposite as is specifically set forth in the Dissent (App. F, pp. A-29, 30). If the trial court be deprived of virtually inherent power to review and correct its own error of its own accord in favor of an additional examination of each transcript or appendix to determine whether the reviewer would have similarly acted, it would compound intolerable delay and resultant injustice.

CONCLUSION

There is a tremendously important principle involved here affecting many people. It is a true conflict which is not merely an inconsistency in general principles. It is one which can be resolved by action of this Court alone. The matter in issue is important, not only to litigants, but affects members of the Bar and the future work load of the Court of Appeals for the Eighth Circuit. There is now no uniformity within that Circuit. The conflict between the Decision here and those of other Circuits is clear. Petitioner respectfully submits that this matter comes within the provisions of Rule 19, 1(b), Rules of the Supreme Court of the United States, in that the Panel of the Court of Appeals for the Eighth Circuit has so far departed from the accepted judicial procedures so as to call for the exercise of this Court's power.

Respectfully submitted

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Certificate of Service

I hereby certify that on the 18 day of December, 1972, three (3) copies of Petition for Writ of Certiorari were mailed to Counsel for the Respondents as follows:

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I further certify that all parties required to be served have been served.

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APPENDIX

APPENDIX A

United States District Court
Eastern District of Missouri
Eastern Division

Fireman's Fund American Insurance Companies, a Corporation, et al., Plaintiff, vs. Aalco Wrecking Company, Inc., a Corporation, Defendant.	69 C 51(3)

Defendant's Motion to Have Verdict and Judgment Set Aside and to Have Judgment in Accordance With Defendant's Motion for Directed Verdict or in the Alternative for a New Trial and Motion to Stay Execution or Enforcement of Judgment.

The defendant Aalco Wrecking Company, having moved for a directed verdict at the close of plaintiffs' evidence and at the close of all of the evidence, which said motions were denied, hereby moves the Court to enter judgment in accordance with defendant's said motions for a directed verdict and moves the Court to set aside the verdict entered in the above entitled action on May 6, 1970 and the judgment entered thereon on May 6, 1970.

In the alternative, if the foregoing motion is not granted, the defendant Aalco Wrecking Company moves the Court for an order vacating and setting aside the verdict of the jury returned herein on May 6, 1970 and the judgments entered thereon on May 6, 1970 in favor of Fireman's Fund Insurance Company, Millers Mutual Insurance Company, American Motorist Insurance Com-

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pany, Northwestern Mutual Insurance Company, Pennsylvania National Mutual Insurance Company, the General Insurance Corporation and Commercial Union Insurance Company of America and granting defendant a new trial for each of the following several reasons affecting materially the substantial rights of the defendant, to wit:

1. The Court is without jurisdiction in this cause in that plaintiffs pleaded in their petition the issue of diversity of citizenship which issue was denied in the responsive pleadings filed by defendant herein and which issue was within those to which defendant is entitled to a trial by jury, they having been made a part of said cause and denied by proper pleadings. No evidence of the residence and location of principal offices or place of incorporation was introduced by plaintiffs.

2. The verdict is contrary to the law.

3. The verdict is contrary to the evidence.

4. The verdict is contrary to the law and the evidence.

5. The evidence in this case is totally insufficient to show any liability on the part of the defendant; there is no substantial evidence that the defendant is guilty of negligence and there is no evidence to sustain the verdict of the jury herein.

6. The Court erred in denying defendant's motion for a directed verdict at the close of plaintiffs' case.

7. The Court erred in denying defendant's motion for a directed verdict at the close of all of the evidence.

8. The evidence considered in its most favorable light on behalf of the plaintiffs is insufficient to support any verdict that might be rendered for the plaintiffs against defendant herein.

9. There is no sufficient or substantial evidence tending to support the amount of the jury's verdict.

10. The verdict of the jury appears to have been given under the influence of passion and prejudice.

11. The verdict of the jury patently disregards the evidence with respect to the retention of properties allegedly lost or destroyed or damaged.

12. The Court erred in admitting incompetent, irrelevant and immaterial evidence offered by plaintiffs and over objection of the defendant.

13. The Court erred in excluding competent, relevant and material evidence offered by the defendant.

14. The Court erred in admitting evidence over defendant's objections, particularly through the witness Fred M. Klein of an incompetent and highly speculative character which was with reference to the early discovery of the fire occurring August 4, 1965 had a watchman been present at the scene, the receipt of which was highly prejudicial to defendant.

15. The verdict was against the charge of the Court.

16. The verdict could only have been reached by conjecture without relation to any of the evidence in the cause.

17. The Court erred in allowing counsel for plaintiffs to cross-examine Mr. Myron Hochman in Rebuttal as an adverse witness without a prior showing of hostility or adversity.

18. The Court erred in allowing members of the jury to write down certain recitations of plaintiffs' counsel at counsel's suggestion over the objection of defendant and in plain view of all parties which action was highly prejudicial to the substantial rights of defendant.

19. The Court erred in allowing plaintiffs at the close of plaintiff's evidence to amend the prayer of their amended complaint by interlineation and inserting a

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wholly inconsistent, new and prejudicial matter wherein another party plaintiff was added to the prayer, namely Northwestern Mutual Insurance Company and which amendment allowed said Northwestern Mutual Insurance Company to pray for judgment in the amount of $26,224.19, when said party had never until that time made any prayer for judgment against defendant, all of which is highly prejudicial to defendant.

20. The Court erred in refusing to instruct the jury as requested by defendant in its requested instructions D, E, F, G.

21. The Court erred in giving over the specific objections of defendant, plaintiffs' instruction number "4" being plaintiffs' verdict directing instruction.

22. The Court erred in giving over the specific objections of defendant, plaintiffs' instruction relating to damages and being unnumbered.

Defendant further moves the Court to stay the execution of any proceeding to enforce the judgment or judgments entered herein on May 6, 1970 or execution thereon pending the disposition of defendant's motion for judgment in accordance with motion for directed verdict or in the alternative for a new trial.

And of the matters herein defendant prays judgment of the Court.

Respectfully submitted

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APPENDIX B

United States District Court, Eastern District of Missouri, Eastern Division

Fireman's Fund American Insurance Companies, a Corporation, et al., Plaintiff, vs. Kaleo Wrecking Company, Inc., a Corporation, Defendant.	69 C 51(3).

Order

The Court having fully considered defendant's post-trial motions, it is hereby ordered:

1. Defendant's motion to set aside verdict and judgment in accordance with its motion for directed verdict at the close of all the evidence is hereby granted on the grounds that there is no substantial evidence that defendant was guilty of negligence as submitted in plaintiff's instruction No. 4 and that plaintiffs failed to prove that whatever damages or loss they sustained were proximately caused by negligence on the part of defendant, and the Clerk is directed to set aside the verdicts and judgments of May 6, 1970 entered on said verdicts and to enter a new judgment herein in favor of defendant and against all plaintiffs.

2. If the judgment entered pursuant hereto shall be vacated or reversed on appeal, defendant's alternative motion for new trial is granted on grounds 1, 3, 5, 7, 8, 9, 14, 15, 16, and 21 of said motion.

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3. Defendant's motion to remand the claim of Pennsylvania National Mutual Company to the Circuit Court of the City of St. Louis is denied.

Dated this 14th day of August, 1970.

/s/ JOHN K. REGAN
United States District Judge

APPENDIX C

United States District Court
Eastern District of Missouri
Eastern Division

Fireman's Fund American Insurance Companies, a corporation, et al., Plaintiff, vs. Aalco Wrecking Company, Inc., a corporation, Defendant.	69 C 51(3)

Judgment

In accordance with the Court's Order dated August 14, 1970; it is hereby Ordered and Adjudged that the verdicts and judgments of May 6, 1970, entered on said verdicts are hereby set aside and judgment is entered herein in favor of defendant and against all plaintiffs, at plaintiffs' costs.

LEO C. DeVOTO, JR.
Clerk
United States District Court

Entered by direction of the Court this 17th day of August, 1970.

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APPENDIX D

United States Court of Appeals
For the Eighth Circuit

No. 20,552

Fireman's Fund Insurance Company, a Corporation; Miller's Mutual Insurance Company, a Corporation; American Motorists Insurance Company, a Corporation; Northwestern Mutual Insurance Company, a Corporation; Pennsylvania National Mutual Insurance Company, a Corporation; The General Insurance Corporation, a Corporation; and Commercial Union Insurance Company of America, a Corporation, Appellants,

v.

Aalco Wrecking Company, Inc., a Corporation, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: October 18, 1971.

Filed: August 7, 1972.

Before Lay, Heaney and Stephenson, Circuit Judges.

Lay, Circuit Judge.

Plaintiff insurance companies initiated this subrogation action to recover the damages to their assureds arising from a fire loss at the Shapleigh Warehouse Complex in St. Louis, Missouri, on August 4, 1965. Plaintiffs received a jury verdict against the defendant, Aalco Wrecking Company, Inc., who was engaged in demolition work at the complex; however, on post trial motions the district court granted defendant's motion for judgment n.o.v. and alternatively under Federal Rule of Civil Procedure 50(c) defendant's motion for new trial. Plaintiffs now appeal this judgment. We reverse with direction to enter judgment for the plaintiffs in accordance with the original verdict.

In August 1965 the defendant Aalco conducted demolition work on a group of buildings in downtown St. Louis. In the early morning hours of August 4, 1965, a blaze was discovered in the buildings. At the time of discovery the fire had reached three to five alarm proportions. Soon after the fire department arrived the fire spread out of control damaging the assured's personal property which was stored in an adjacent building. The cause of the fire was unknown. Plaintiffs claim that the delay in the detection of the fire caused the extensive destruction and resulted from defendant's failure to have a watchman on the premises. Plaintiffs assert that the defendant did not and could not secure the demolition site from intruders and did not maintain a watchman at the site to protect the buildings and notify the fire department of any fires.

The trial court submitted the case to the jury under the following instructions:

> "Your verdict must be for the plaintiffs if you believe:
>
> First, a fire started in the area being demolished by the defendant and spread to adjacent property, in-

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cluding that occupied by the insured tenants mentioned in evidence, and

Second, the buildings being demolished by defendant were not secured against transients or vandals and it was not reasonably possible to do so, and defendant provided no watchman while the demolition was not in progress, and

Third, defendant's failure to employ a watchman was negligence, and

Fourth, as a direct result of such negligence there was a delay in discovering and reporting the fire to the fire department, and

Fifth, as a direct result of such delay the fire spread to property occupied by the tenants and caused damages to them and losses to the plaintiffs."

We find substantial evidence to sustain the jury's finding of negligence and proximate cause arising from defendant's failure to employ a watchman.

Although there was conflicting testimony, substantial evidence was presented to establish that at the time the fire was originally discovered it was burning in the area demolished by the defendant, and from there it spread to the adjacent property.

Considerable evidence was offered to prove that defendant did not and could not secure the buildings being razed and that defendant had not employed a watchman. The Building Code of the City of St. Louis § 2116.2(9) provides:

> "All buildings to be razed three stories in height or greater shall be kept secure against entry of transients or vandals. If security is not possible, watchman shall be provided during the hours wrecking is not being accomplished."

Defendant's witnesses agreed that *if* the buildings could be secured, there was no need for a watchman on the demolition site. Implicit in this testimony was the premise that if the buildings were not secure, it was customary within the construction trade in St. Louis to provide a watchman. Thus, one of the focal issues turned on the factual question whether the buildings could be made secure. On the basis of the record presented this court cannot say substantial evidence did not exist to support the jury's finding as to the lack of security in the building complex.

Captain Klein of the St. Louis fire department visited the demolition site on August 3, 1965, the evening before the fire. His testimony reads:

> "A. No, I don't recall a single instance where we had to force a door or anything else. Most of the times the doors were hanging open, and we just walked right through.
>
> "Q. Did you normally walk through the buildings?
>
> "A. Right.
>
> "Q. On the evening of August 3, 1965, did you have occasion to observe whether the fire doors, many of which are exposed and showing as little brown cardboard spots on this model, were open or closed?
>
> "A. I'd say for the most part they were either open or gone entirely.
>
> "Q. All right, sir. Now, in prior visits when you went into the building, Captain, or the buildings, did you have any difficulty gaining access to Building No. 11?
>
> "A. None whatsoever. No. In fact, we had driven the battalion car in there and turned it around inside this building. It was large enough for a truck.

. . . .

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"Q. And at any time when you were in these buildings, Captain, had you had any difficulty in gaining access from one to the other?

"A. No, none whatsoever." App. at 262-63.

Several other witnesses verified that the buildings were not always secure. Even Aalco's superintendent indicated that it was impractical to secure portions of the complex.

The evidence amply supports the conclusion that there was a delay in discovering and reporting the fire. The record shows that Captain Klein estimated that the fire had been burning up to one hour before the fire department's arrival. The record also shows that there was a Potter electronic supervisory alarm line which was grounded at 2:10 a.m., twenty-one minutes before any report of the fire.[1]

Defendant challenges plaintiffs' right to recover on the basis that defendant's failure to provide a watchman did not constitute (1) negligence or (2) the proximate cause of the plaintiffs' damage. We must disagree.

Violation of a city ordinance under Missouri law is evidence of negligence. See *Dickerson v. St. Louis Public Service Co.*, 286 S.W.2d 820, 824 (Mo. 1956); *Wells v. Henry W. Kuhs Realty Co.*, 269 S.W.2d 761, 767 (Mo. 1954). See also *Cichacki v. Langton*, 392 S.W.2d 397, 400

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[1] The Potter Electric Alarm Company had installed and was monitering the fire sprinkler systems for the entire complex. Because of the demolition project's interference with its existing electrical cables, a temporary plastic cable was run along the sprinkler piping and spliced to the original cable in order to supervise the remaining buildings. At 2:10 a.m. on August 4, 1965, Potter recorded a "ground" signal which meant that the insulation surrounding the wire was destroyed and was touching a conductor to the ground, such as the sprinkled piping. There was no dispute that the fire caused Potter's "ground" signal, and as a result of the "ground" no alarm could be received from the sprinkler systems.

(Mo. 1965).[2] Although the ordinance was offered and received in evidence, the plaintiffs did not request an instruction on it nor did the trial court instruct the jury under it. Nevertheless, the jury could without error consider the ordinance as evidence of negligence. The failure of the court to instruct on the ordinance was not prejudicial to the defendant. Section 2116.2(a) of the Building Code of the City of St. Louis was expressly enacted, along with other sections, to require fire safety precautions and to avoid fire hazards. Plaintiffs' assureds were clearly within the class of beneficiaries whom the Code sought to protect. However, notwithstanding consideration of the ordinance, there existed sufficient credible testimony, including statements from the defendant's own witnesses, that it was the custom recognized in the construction trade in St. Louis to have a watchman on demolition premises unless the premises could be made secure.

Under common law where a party fails to provide protection against known dangers, that failure has been held to be negligence. Cf. *Imperial Oil, Ltd. v. Drlik*, 234 F.2d 4 (6 Cir. 1956), cert. denied, 352 U.S. 941 (failure to post a watchman at the rail of a vessel to warn the ship's winch operator of danger to dock crewman from suddenly-drawn-taut mooring lines); *Brumm v. Goodall*, 147 N.E. 2d 699 (Ill. App. 1958) (failure to provide sufficient life-

[2] Another suit arising out of this fire loss was brought by different subrogors and resulted in a verdict for Aalco in the Missouri state court. See *Washington v. Aalco Wrecking Co.*, Docket No. 55,193 (Mo. 1971). On appeal verdict for the defendant was affirmed. However, in January 1972 the court entertained a rehearing on the question whether violation of the Building Code provisions (including § 2116.2(9)) constituted negligence per se. The plaintiffs apparently, as here, did not request an instruction on the ordinance although the ordinance was received into evidence. It is significant that the Missouri Supreme Court did not reject plaintiffs' theory of common law negligence and proximate cause which was identical to that which has been asserted here. As of this writing no decision has been rendered on the reargument.

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guard supervision); *Richardson v. Ham,* 285 P.2d 269 (Cal. 1955) (undue risk of harm created by an unattended bulldozer); *Stoutwell v. Board of Trustees of Stanford Univ.,* 148 P.2d 405 (Cal. App. 1944) (failure to have a sufficient number of police to protect university students); *Stevens v. City of Pittsburgh,* 198 A. 655 (Pa. 1938) (lack of proper supervision of young boys firing rifles); *Rovegno v. San Jose Knights of Columbus,* 291 P. 848 (Cal. App. 1930) (failure to furnish lifeguards).

If an owner of property negligently allows the spread of a fire on his premises, he may be liable for injury to others even though he has no connection with the fire's origin. See *Capra v. Phillips Investment Co.,* 302 S.W.2d 924, 928 (Mo. 1957). See also *Willard v. Bethurem,* 234 S.W.2d 18 (Mo. App. 1950); *Steele v. Darner,* 124 Mo.App. 338, 103 S.W. 582 (1907). In *Reid & Sibell, Inc. v. Gilmore & Edwards Co.,* 285 P.2d 364 (Cal. App. 1955), the defendant was storing highly inflammable liquids in its section of a building also occupied by plaintiff. The building caught fire, and plaintiff contended that the fire spread and injured plaintiff's property as a result of the combustion of the liquids stored by defendant. Plaintiff complained that defendant was negligent, not for starting the fire, but for failing to take reasonable precautions to prevent the spread of the fire since it knew that if a fire was to start, the high flammability of its stored liquids would cause the fire to readily endanger plaintiff's property. The court agreed, saying:

> "There seems no sound reason to restrict this right and its corresponding duty to acts which contribute to the origin of a fire, as distinguished from its spread. In other jurisdictions, the rule, particularly in the later cases, appears to follow the view that one is liable for acts or omissions which cause the spread of fire of whatever origin." 285 P.2d at 368.

In view of all the surrounding circumstances, we conclude that the trial court properly submitted to the jury the issue of negligence arising from the defendant's failure to furnish a watchman on the premises.

Defendant likewise challenges the submission to the jury of the question whether the failure to furnish a watchman constituted the proximate cause of the fire spreading to the property of plaintiffs' assureds. The defendant argues that it is speculative whether a watchman could have seen the fire in sufficient time to have prevented its eventual destruction.

It is well settled under the law of Missouri that the causal connection between negligence and harm need not be established by direct evidence. Causation may be established by proof of facts and circumstances from which the connection may be reasonably inferred. *State v. Haid*, 28 S.W.2d 97, 102 (Mo. 1930); *Phillips v. Stockman*, 351 S.W.2d 464, 473 (Mo.App. 1961); *Leek v. Dillard*, 304 S.W.2d 60, 65 (Mo.App. 1957); *Long v. F. W. Woolworth Co.*, 109 S.W.2d 85, 88 (Mo.App. 1937).[3]

There were many evidential factors which the jury could have properly considered relating to the issue of proximate cause: (1) demolition premises are recognized as a highly hazardous fire area; (2) the ground wires on the fire alarm indicated the fire had burned for at least one-half hour before it was visually discovered and reported; (3) the fire was observed from three blocks away by a

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[3] The United States Supreme Court in *Lavender v. Kurn*, 327 U.S. 645, 653 (1946), aptly observed:

> "Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."

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night watchman twenty-one minutes after the electrical alarm was grounded; (4) Captain Klein of the St. Louis fire department testified that in his opinion if the fire had been reported fifteen minutes earlier, damage to the adjoining property would have been averted; (5) the fire had been burning up to an hour before the fire department arrived and two of the buildings were completely engulfed in flames.

In *Steele v. Woods*, 327 S.W.2d 187, 195 (Mo. 1959), the Missouri Supreme Court recognized that:

> "It is sufficient if there is substantial evidence which shows that the injury is a natural and probable consequence of the negligent act or omission. And this can be determined by reasonable inference from proven facts or circumstantial evidence. Where the logical conclusion from the evidence is that if certain things were properly done certain results would not have occurred, and they *did* occur, the question of causal connection is sufficient to go to the jury."[4]

There are many instances in tort litigation where precise causation becomes difficult to prove. There is no exact way to prove that the harm might have been avoided, because the harm did in fact take place. Thus, whether a fall in an inadequately lighted area would not have occurred if the premises had been properly lighted,[5]

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[4] In *Rovegno v. San Jose Knights of Columbus*, 291 P. 848 (Cal. App. 1930), the California court stated:

> "[T]he only negligence alleged is the failure of respondents to provide a lifeguard or other person or persons skilled in lifesaving. Even had such a guard been present, respondents urge, there is no showing that the boy's life would have been saved. Just what would have happened had a lifeguard been present is, of course, not capable of direct proof. It is largely a matter of speculation or of inference. Even so, it has been held that the question is one for the jury and not one for the court." 291 P. at 849-850.

[5] *Swanson v. Goodwin*, 327 S.W.2d 903 (Mo. 1959).

whether typhus disease would have been contracted if it had not been for a rat infested cellar of an apartment project,[6] or whether an explosion would have occurred even with proper ventilation,[7] each requires a judgment of whether the defendant's conduct causally contributed to the harm. A plaintiff does not have the negative burden to show that the harm could not have possibly occurred if the defendant had performed the duty breached. It would be absurd to say that a defendant could hide behind such absence of proof where his own conduct has created the fertile ground for harm and the harm did in fact occur. It has long been recognized that:

> "[I]f the actor's negligence, either of act or omission results in harm of the sort from which the duty was designed to protect the other, his negligence may be regarded as a substantial factor in bringing about the harm in spite of the fact that the same harm might possibly have been sustained had the actor not been negligent." *Maryland v. Manor Real Estate & Trust Co.*, 176 F.2d 414, 418 (4 Cir. 1949).[8]

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[6] *Maryland v. Manor Real Estate & Trust Co.*, 176 F.2d 414 (4 Cir. 1949).

[7] *Marshall v. Humble Oil & Refining Co.*, 459 F.2d 355 (8 Cir. 1972).

[8] See also Restatement of Torts, Second, § 433B, comment a.

> "A mere possibility of such causation is not enough; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant."

This statement is to be balanced by comment b.

> "The plaintiff is not, however, required to prove his case beyond a reasonable doubt. He is not required to eliminate entirely all possibility that the defendant's conduct was not a cause. It is enough that he introduces evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no man can say with absolute certainty what would have

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We conclude that the evidence was sufficient for the jury to pass on the question of proximate cause. Thus, we conclude the trial court erred in granting a judgment notwithstanding the verdict.

The trial court also granted defendant's alternative motion for a new trial. Generally this court has upheld the exercise of the trial court's grant of a new trial as within his discretion. *Silverthorn v. Hennigan*, 439 F.2d 704, 705 (8 Cir. 1971); *Bates v. Hensley*, 414 F.2d 1006, 1011 (8 Cir. 1969); *Simpson v. Skelly Oil Co.*, 371 F.2d 563, 566-567, 570 (8 Cir. 1967); *Bankers Life & Casualty Co. v. Kirtley*, 307 F.2d 418, 423 (8 Cir. 1962); *Altrichter v. Shell Oil Co.*, 263 F.2d 377, 380 (8 Cir. 1959). When evidence is erroneously admitted or excluded or where the trial court has erred in the instructions to the jury, the trial court is considered in a better position to correct a manifest injustice in ruling on the motion for new trial. Under these circumstances the grant of the new trial does not interfere with the role of the jury as the trier of fact. Cf. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940); *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90 (3 Cir. 1960), cert. denied, 364 U.S. 835. However, we are not faced with this kind of ruling here.

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occurred if the defendant had acted otherwise. If, as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists. In drawing that conclusion, the triers of fact are permitted to draw upon ordinary human experience as to the probabilities of the case. Thus when a child is drowned in a swimming pool, no one can say with absolute certainty that a lifeguard would have saved him; but the common experience of the community permits the conclusion that the guard would more probably than not have done so, and hence that the absence of the guard has played a substantial part in bringing about the death of the child. Such questions are normally for the jury, and the court may seldom rule on them as matters of law."

The basic ground relied on by the trial court for granting a new trial in the present case indicate that the court was greatly influenced by its appraisal that the evidence failed to make out a submissible case for the jury to consider. The trial court cited ten grounds for its conditional grant of a new trial. Seven of those grounds were repetitious of the grounds given by the court in support of its judgment n.o.v., relating to the lack of substantial evidence to support the verdict. For the reasons we have previously discussed, we feel the court's judgment n.o.v. was in error.[9]

Although the trial court does not make a specific finding that "the verdict was contrary to the clear weight of the evidence," this court has held that a finding that "the verdict is contrary to the evidence" is to be considered its equivalent. See *Lack Industries, Inc. v. Ralston Purina Co.*, 327 F.2d 266, 273 (8 Cir. 1964). Thus, we conclude the only possible valid ground for the granting of the new trial was that the trial court felt "the verdict was against the clear weight of the evidence."

In *Simpson v. Skelly Oil Co.*, 371 F.2d 563, 566-567 (8 Cir. 1967), this court recognized:

> "There is a difference in the function of a judge when he is ruling on a motion for a directed verdict or a judgment n.o.v. and when he passes on a motion for a new trial. . . . In the former instance, it is

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[9] Defendant's motion also complains that certain testimony of Captain Klein was believed to be too speculative; however, the defendant never objected to its admission. We find no error in this testimony. The trial court also cited plaintiffs' failure to offer evidence of diversity of citizenship. Plaintiff has belatedly introduced uncontroverted affidavits establishing its out-of-state citizenship for diversity purposes. It is fundamental that a new trial should not be granted to rectify such technical failure resulting in harmless error. See Fed. R. Civ. P. 61; *Illinois Terminal R. Co. v. Friedman*, 208 F.2d 675, 680 (8 Cir. 1953). See also 6a Moore, Federal Practice, ¶ 59.08[1], at 3774 and n.8 (2d ed. 1971).

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his duty to accept the plaintiff's version as true for the purposes of the motion, notwithstanding the existence of strong testimony to the contrary; the judge is not concerned with the weight of the evidence. On the motion for new trial, however, he has wider, *though not unlimited*, latitude and he may set the verdict aside where it is against the weight of the evidence, or to prevent injustice." (Emphasis ours.)

Notwithstanding this broad latitude, as noted in the *Simpson* case there exist some boundaries to the exercise of the trial court's discretion in granting a new trial. Although stated with reference to a judgment n.o.v., the Supreme Court in *Tennant v. Peoria and Pekin Union Ry.*, 321 U.S. 29, 35 (1944), explained: "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." We find, as have other circuit courts of appeals,[10] this admonition similarly applicable in dealing with motions for new trial.

It has been recognized in the *Lind* case, supra, that where the trial court finds the verdict contrary to the weight of the evidence and grants a new trial that the appellate court should "exercise a closer degree of scrutiny and supervision . . . in order to protect the litigants' right to jury trial." 278 F.2d at 90. See also 6a Moore, Federal Practice, ¶ 59.08[5] at 3819 (2d ed. 1971). Other circuit courts have expressed similar reservations although sometimes using different terminology. Thus, it has been held that a trial judge should not grant a new trial merely

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[10] See *Beverage Distributors, Inc. v. Olympia Brewing Co.*, 440 F.2d 21, 24-25 (9 Cir. 1971), cert. denied, 403 U.S. 906; *Cities Service Oil Co. v. Launey*, 403 F.2d 537, 539-540 (5 Cir. 1968); *Duncan v. Duncan*, 377 F.2d 49, 52 (6 Cir. 1967), cert. denied, 389 U.S. 913; *Schybinger v. Interlake Steamship Co.*, 273 F.2d 307, 312 (7 Cir. 1959).

because he believes another result would be more reasonable. *Duncan v. Duncan*, 377 F.2d 49, 52 (6 Cir. 1967), cert. denied 389 U.S. 913. Nor should a new trial be granted where there is no valid or useful purpose for submitting the case to another jury. *O'Neal v. W. R. Grace & Co.*, 410 F.2d 908, 915 (5 Cir. 1969). Where the subject matter of the litigation is simple; where there exists no complicated evidence or where the legal principles presented are such that they would not confuse the jury, the court should be reluctant to grant a new trial. See *O'Neal v. W. R. Grace & Co.*, supra at 913; *Lewis v. Metropolitan Life Ins. Co.*, 394 F.2d 608, 614-615 (3 Cir. 1968); *Tidewater Oil Co. v. Waller*, 302 F.2d 638, 643 (10 Cir. 1962). The Fifth Circuit in *Cities Service Oil Co. v. Launey*, 403 F.2d 537 (1968), following *Hampton v. Magnolia Touring Co.*, 338 F.2d 303 (5 Cir. 1964), delineates a basis on which a trial court may require a new trial on the weight of the evidence. The court wrote:

> "Although the cases are not consistent in usage, some cases using the phrase 'clear weight' and others using the phrase 'overwhelming weight' or 'overwhelming evidence,' it seems clear that the jury's verdict must at least be against the *great* weight of the evidence before a new trial may be granted." 403 F.2d at 540.

Otherwise, the Fifth Circuit adds, it "would destroy the role of the jury as the principal trier of the facts, and would enable the trial judge to disregard the jury's verdict at will." We endorse these observations.

Regardless of the rhetoric used the true standard for granting a new trial on the basis of the weight of the evidence is simply one which measures the result in terms of whether a miscarriage of justice has occurred. When through judicial balancing the trial court determines that the first trial has resulted in a miscarriage of justice, the

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court may order a new trial, otherwise not. As in so many other areas of the law, the trial court's judgment is always subject to review under the relevant criteria of law and facts at hand. See 28 U.S.C.A., § 2106.

In the present case we find that the evidence presented does not require reconsideration by a new jury. The evidence is such that reasonable men may differ as to the result, therefore, the determination should properly be left for the jury. See *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532, 538 (2 Cir. 1965), cert. denied 382 U.S. 983 (1966). As to the evidence within the record, there exists no significant weight factor favoring the defendant. In fact, in a second trial plaintiffs would be entitled to a favorable instruction on the St. Louis Building Code. We are hard pressed to say that a miscarriage of justice has taken place in the first trial. We cannot approve under the existing circumstances another time-consuming and costly trial without better justification on the record. All courts should be sensitive to and reasonably avoid crowded dockets. Cf. *Blonder-Tongue Lab., Inc. v. University of Ill. Foundation*, 402 U.S. 313 (1971). Because no good purpose would be served by a second trial and weighing all relevant factors we hold that it was abuse of discretion to grant a new trial.

Judgment reversed and remanded with directions to enter a judgment on the verdict for the plaintiffs.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX E

United States Court of Appeals for the Eighth Circuit
No. 20552. September Term, 1972

Fireman's Fund Insurance Co., etc., et al.,
Appellants,
vs.
Aalco Wrecking Company, Inc., etc.,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellee and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby, denied.

September 26, 1972

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APPENDIX F

United States Court of Appeals for the Eighth Circuit

No. 20,552

Fireman's Fund Insurance Company, a Corporation; Miller's Mutual Insurance Company, a Corporation; American Motorists Insurance Company, a Corporation; Northwestern Mutual Insurance Company, a Corporation; Pennsylvania National Mutual Insurance Company, a Corporation; The General Insurance Corporation, a Corporation; and Commercial Union Insurance Company of America, a Corporation,

Appellants,

v.

Aalco Wrecking Company, Inc., a Corporation,

Appellee.

} Appeal from the United States District Court for the Eastern District of Missouri.

ON PETITION FOR REHEARING EN BANC

Filed: October 16, 1972.

MEHAFFY, Circuit Judge, joined by MATTHES, Chief Judge, dissenting from the denial of rehearing en banc.*

I respectfully dissent from the denial of the petition for rehearing en banc.

I disagree with that portion of the majority opinion which reversed the trial court's order granting a new trial and restored the verdict of something in excess of $200,000.00. In my view, the panel's holding in effect overrules a deeply embedded rule of law in this circuit and ignores the teachings of the Supreme Court in cases of this nature.

The Eighth Circuit Rule.

In this circuit a "motion for new trial is addressed to the judicial discretion of the trial judge and will not be reversed except for a *clear abuse* of that discretion." *Altrichter v. Shell Oil Co.*, 263 F.2d 377, 380 (8th Cir. 1959) (emphasis added); *Bates v. Hensley*, 414 F.2d 1006 (8th Cir. 1969). The rule has also been stated that the "granting of a new trial is a matter within the sound discretion of the trial judge and unless that discretion *patently* has been abused, his ruling is not subject to review." *Silverthorn v. Hennigan*, 439 F.2d 704, 705 (8th Cir. 1971) (emphasis added). The opinion in *Altrichter* gives some insight as to what these words "clear abuse" mean. In that case we held that the trial court could weigh the evidence, disbelieve witnesses and grant a new trial even where there is substantial evidence to sustain the verdict. No inferences are required to be drawn in favor of the verdict or the party against whom the motion is directed. The trial judge may grant a new trial where, in his own judgment, it is necessary to prevent a mis-

* Judge Gibson did not participate.

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carriage of justice. I note the language of Barron & Holtzoff, quoted with approval in *Altrichter, supra,* at 380: "It is his right, and indeed his duty, to order a new trial if he deems it in the interest of justice to do so."

Examples of Facts which Clearly Distinguish This Case from Those Cited in the Panel's Opinion.

The panel relied upon and quoted extensively from Captain Klein's testimony. His testimony was objected to as speculative and calling for a conclusion that the fire department would probably have stopped the fire before it caused plaintiffs' losses if he had received an alarm ten to fifteen minutes earlier. The panel's statement that Klein's testimony was not objected to is clearly wrong. Although the trial judge overruled the objection, he assigned this ruling as one of his grounds for granting a new trial. Captain Klein had testified that the major portion of the fire was in building No. 11 behind the freight loading area of that building, that the fire was above the canopy of the northernmost bridge and just starting on the bridge, and that the bridge was not engulfed in flames at the time of the arrival of the fire department. He further testified that his men were putting water on one of the bridges until he ordered them out of the area. His testimony was to the effect that only building No. 11 was "heavily involved" at the time of their arrival. His testimony as to whether the bridge was on fire is contraverted by the testimony of Captain Berne of the fire department, fireman Holland, and a railroad employee, Anielak, who had reported the fire and arrived at the scene before the firemen. Fireman Holland testified that he was one of the firemen on the ramp with the fire hose, that the water would not reach the bridge, that the fire eventually crossed the bridge into the buildings con-

taining plaintiffs' insureds' property. Mr. Cohn, an expert witness, testified that the fire started, not in building No. 11, but "towards the east end of the northernmost bridge." Evaluating the evidence according to the analysis of the trial court, Captain Klein's opinion as to whether the fire department could have stopped the fire was based on untrue facts and was speculative and conclusionary.

The trial court also stated that the evidence was insufficient to support a finding of negligence. Plaintiffs' proof was to the effect that a watchman should have been at this site because the site could not be made secure against entry. While there is some evidence to support this contention, much of plaintiffs' evidence relates to buildings 11 and 12. Building 12 was in reality nothing but a wall with some supporting timbers. There was nothing to secure. Much of plaintiffs' evidence tending to show the unsecured condition of building 11 related to the first and second floors. The first floor was in fact a ground-level railroad yard, and there was testimony that it was not considered part of the building. The second floor was an open loading area for trucks constructed of steel and concrete. It is apparently this area into which Captain Klein drove his car. There was nothing to secure except a large open area. There was ample testimony that passageways from these areas into the buildings were secured. Again viewing the evidence according to the analysis of the trial court, it is difficult to see any clear abuse of discretion in ordering a new trial on this point.

Further, a witness for one of the plaintiffs testified in effect that after collecting the insurance on some of his property he sold the insured goods at a price higher than their cost. He thus showed a profit instead of a loss. No damages should have been allowed on this point, and the trial court's order for a new trial should be sustained on this point.

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By setting out the above, I have not implied that those points are the only ones to be considered. Rather, they are examples which support a finding that there was no clear or patent abuse of discretion in ordering a new trial.[1]

The Supreme Court's Teachings.

The panel's opinion relies on and quotes from *Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29 (1944). *Tennant*, however, did not even consider a motion for new trial, but involved only a judgment n.o.v. granted by a court of appeals. This was an opinion by Mr. Justice Murphy for a divided Court. *Tennant* should be considered in the light of other Supreme Court cases such as *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 (1933); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 at 247 (1940); *United States v. Johnson*, 327 U.S. 106 (1946), which did deal with motions for new trial. *See also Neely v. Martin K. Eby Const. Co.*, 386 U.S. 317 (1967); *Neese v. Southern Ry.*, 350 U.S. 77 (1955).

As Justice Brandeis said in *Fairmount Glass Works, supra*:

> "The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals." (Footnotes omitted.) 287 U.S. at 481.

In the same opinion Justice Brandeis went on to say:

> "Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want

---

[1] The majority's opinion finds only that "it was abuse of discretion to grant a new trial."

of diligence or perspicacity in appraising the jury's conduct." *Id.* at 485.

Similarly the Court stated in *United States v. Johnson, supra,* that:

"[I]t is not the province of this Court or the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact." 327 U.S. at 111.

The Court then went on to conclude that:

"The circuit court of appeals was right in the first instance, when it declared that it did not sit to try de novo motions for a new trial. It was wrong in the second instance when it did review the facts de novo and order the judgment set aside." *Id.* at 113.

Conclusion.

The panel claims in its conclusion that it is hard pressed to say that a miscarriage of justice has taken place in the first trial. The only sure way to prevent a miscarriage of justice in this case is to grant the rehearing and sustain the trial court's order granting a new trial. This is a complicated case with a lengthy record and it clearly requires something more than a weighing of the evidence when the trial court has concluded that it mistakenly admitted testimony which could well have influenced the jury. The effect of it cannot be ascertained except by a new trial.

The rationale of avoiding additional burdens for the court dockets, used as one of the reasons for reversing the new trial order, is misleading. There is no way to predict how much additional work will be created if the rule of this circuit in such matters is abrogated. If we

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must follow the panel's new rule, it will place this cou
in the role of trying cases de novo for which we are n
and cannot be equipped. Furthermore, this new appella
capacity threatens to erode the factfinding responsibili
of the district courts.

Finally, I note that the panel's opinion finds there w
an abuse of discretion. Certainly it is not an abuse
discretion to grant a new trial when inadmissible tes
mony is admitted. Now we can assume that every par
litigant in a case where there is a new trial granted b
the district court will contend that there is a mere abu
of discretion on the trial court's part; hence, the tri
court's action should be reversed and judgment enter
here.

For the reasons stated, I would grant the petitio
uphold the trial court and send this case back to th
court for a new trial.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX G

United States Court of Appeals
for the Eighth Circuit

No. 20552 September Term, 1972

Fireman's Fund Insurance Co., a Corporation, et al., Appellants,

vs.

Aalco Wrecking Company, Inc., a Corporation, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

On consideration of the motion of appellee for a stay of the mandate in this cause pending petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed to and including December 26, 1972. If within said period of time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

October 20, 1972

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[redacted]

[redacted]

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-903

AALCO WRECKING COMPANY, INC.,
Petitioner,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation; MILLER'S MUTUAL INSURANCE COMPANY, a Corporation; AMERICAN MOTORISTS INSURANCE COMPANY, a Corporation; NORTHWESTERN MUTUAL INSURANCE COMPANY, a Corporation; PENNSYLVANIA NATIONAL MUTUAL INSURANCE COMPANY, a Corporation; THE GENERAL INSURANCE CORPORATION, a Corporation; and COMMERCIAL UNION INSURANCE COMPANY OF AMERICA, a Corporation,
Respondents.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

OPINIONS OF THE CASE

Both the opinion of the Court of Appeals for the Eighth Circuit entered on August 7, 1972, and the dissenting opinion to the order of the Court of Appeals for the Eighth Circuit denying the Petition for Rehearing have been reported at 466 F.2d 179.

JURISDICTION

The jurisdictional statement in the Petition for Certiorari is correct.

QUESTIONS PRESENTED

1. Whether an abuse of discretion by a United States District Judge in granting a new trial is immune from review by the Courts of Appeal.

RELEVANT FACTS

The evidence at trial established that the fire started on the premises controlled by Petitioner. The first witnesses to observe the fire at close range, Mr. Martin Brutton and Mr. Clifford Brown, testified that the fire was confined to the area of the demolition site controlled by Petitioner. Petitioner's own expert placed the origin of the fire in the area controlled by Petitioner.

The evidence is undisputed that the fire burned for up to one hour before it was discovered and that because of this delay in discovery, the St. Louis Fire Department was unable to prevent the spread of the fire to the adjoining property. If the fire had been reported ten to fifteen minutes earlier, the Fire Department could have prevented its spread. It was also undisputed that under the circumstances of this case, a watchman would have been the most effective means of preventing a delayed alarm.

Both the St. Louis city ordinance and the custom and practice of the demolition industry require that a watchman be present on the demolition site after working hours if the site cannot be secured. It is admitted by Petitioner that no watchman was present. At trial, Petitioner chose

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to justify the absence of a watchman by claiming that the buildings were secure. Notwithstanding this claim, Petitioner's own employees testified that the buildings had been broken into on several occasions. In addition, members of the St. Louis Police and Fire Departments testified that the buildings were not secure.

The only specific objection to any testimony the trial court gave as a reason for granting a new trial was Item 14 of Petitioner's alternative motion. That item objects to testimony by Captain Klein with reference to the early discovery of the fire occurring on August 4, 1965, had a watchman been present at the scene. In point of fact, Captain Klein never testified that a watchman, had one been present, would have discovered the fire as this claimed error would suggest. The testimony of Captain Klein that had this fire been discovered ten to fifteen minutes earlier, the Fire Department could have put out the fire prior to its reaching Respondents' insureds' building was uncontradicted. This testimony was admitted by the trial court and was not raised as a ground for granting a new trial.

REASONS FOR DENYING THE WRIT

No decision of this Court denies the courts of appeal the power to correct an abuse of discretion by a district judge in ordering a new trial in a jury case. The courts of appeal are unanimous in asserting that the power exists. The extremely rare instances of reversal of a district judge's decision on this ground demonstrates the insignificance of the question presented by the Petition for Certiorari.

There are no special or important reasons for granting the Writ under United States Supreme Court Rule 19.

ARGUMENT

The Court of Appeals for the Eighth Circuit, after a careful review of the facts, found that the district court had abused its discretion in granting a new trial on the ground that the verdict was against the weight of the evidence. **Fireman's Fund Insurance Company v. Aalco Wrecking Company,** 466 F.2d 179, 187-188. The narrow question presented on this Petition is whether a court of appeals has the power to make such a determination. The decision of the court of appeals in this case that it had the power to review the grant of a new trial and reverse the trial court if the grant was an abuse of discretion is not in conflict with either the decisions of this court, the decisions of the other courts of appeal, or the Federal Rules of Civil Procedure.

Prior to the amendment of the Federal Rules of Civil Procedure in 1963, there was some confusion among the courts of appeal as to the reviewability of orders conditionally granting new trials when the accompanying judgment notwithstanding the verdict was reversed. Some courts of appeal held that such orders were not reviewable, **Binder v. Commercial Travelers Mutual Accident Association of America,** 165 F.2d 896 (2nd Cir. 1948), while others held they were reviewable and could be reversed if the trial court had abused its discretion in conditionally granting a new trial. **Aetna Casualty and Surety Company v. Yeatts,** 122 F.2d 350 (4th Cir. 1941); **Turner v. United States,** 229 F.2d 944 (6th Cir. 1956); **Daffinrud v. United States,** 145 F.2d 724 (7th Cir. 1944); **Moist Cold Refrigerator Company, Inc. v. Lon Johnson Co., Inc.,** 249 F.2d 246 (9th Cir. 1957); **Lind v. Schenley Industries, Inc.,** 278 F.2d 79 (3rd Cir.), cert. denied, 364 U.S. 835 (1960). Even prior to the 1963 amendments to the Rules, the grant of a new trial was reviewable in connection with the appeal

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from the judgment rendered at the conclusion of the second trial, where the trial judge had abused his discretion in awarding a new trial in the first instance. **Pettingill v. Fuller,** 107 F.2d 933 (2nd Cir. 1939), cert. denied 309 U.S. 669 (1940).

In 1963, this confusion was cleared up by the amendment of Rule 50 of the Federal Rules of Civil Procedure. The power of the courts of appeal to reverse an alternative grant of a new trial cannot be seriously challenged in view of the amendment to Rule 50. The note of the Advisory Committee accompanying the 1963 amendment to Rule 50 states:

> "The party against whom the judgment n.o.v. was entered below may, as appellant, besides seeking to overthrow that judgment, also attack the conditional grant of the new trial. And, the Appellate Court, if it reverses the judgment n.o.v., may in an appropriate case also reverse the conditional grant of the new trial and direct that judgment be entered on the verdict."

Of particular interest is the citation by the Advisory Committee, as authority for this statement, of **Lind v. Schenley Industries, Inc.**, *supra*, wherein the Court of Appeals for the Third Circuit found an abuse of discretion and reversed a conditional order granting a new trial.

Thus, it is now clear that an order conditionally granting a new trial may be reviewed for an abuse of discretion, even when based upon such broad grounds as the trial judge's conclusion that the verdict was excessive or was against the weight of the evidence. **Taylor v. Washington Terminal Company**, 409 F.2d 145 (D.C. Cir. 1969).

A number of courts of appeal have had occasion to review and reverse orders conditionally granting a new

trial. **Lewin v. Metropolitan Life Insurance Company**, 394 F.2d 608 (3rd Cir. 1968); **Duncan v. Duncan**, 377 F.2d 49 (6th Cir.), cert. denied, **Fain v. Duncan**, 389 U.S. 913 (1967); **O'Neil v. W. R. Grace and Co.**, 410 F.2d 908 (5th Cir. 1969); **Continental Airlines, Inc. v. Wagner-Morehouse, Inc.**, 401 F.2d 23 (7th Cir. 1968); **Horston v. Harvlan, Inc.**, 457 F.2d 1105 (3rd Cir. 1962); **Berner v. British Commonwealth Pacific Airlines, Ltd.**, 346 F.2d 532 (2nd Cir. 1965), cert. denied, 382 U.S. 983 (1965); **Powell v. Litity Mutual Insurance Company**, 419 F.2d 62 (5th Cir. 1969); **Taylor v. Washington Terminal Company**, 409 F.2d 145 (D.C. Cir. 1969); **Grove v. Dun & Bradstreet, Inc.**, 438 F.2d 433 (3rd Cir. 1971), cert. denied, 92 S. Ct. 204; **Ross v. Chesapeake & Ohio Railway Company**, 421 F.2d 328 (6th Cir. 1970).

The repeated denial by this court of certiorari to courts of appeal which have reversed the conditional grant of a new trial where the trial judge has abused his discretion negates the assertion in the Petition for Certiorari that uncertainty or a conflict exists with respect to the principle of law to be followed in such cases. Particularly, this court denied certiorari in **Lind v. Schenley Industries, Inc.**, 278 F.2d 79 (3rd Cir.), cert. denied, 364 U.S. 835 (1960); in **Berner v. British Commonwealth Pacific Airlines, Ltd.**, 346 F.2d 532 (2d Cir.), cert. denied, 382 U.S. 983 (1965), and in **Duncan v. Duncan**, 377 F.2d 49 (6th Cir.), cert. denied, **Fain v. Duncan**, 389 U.S. 913 (1967).

The cases relied upon by the Petitioner here do not support the proposition that the courts of appeal are forbidden to review the conditional grant of a new trial for an abuse of discretion. In their case of main reliance, **Fairmont Glass Works v. Cub Fork Coal Company**, 287 U.S. 474, 485, this court stated:

> "Whether refusal to set aside a verdict for failure to award substantial damages may ever be reviewed

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on the ground that the trial judge abused his discretion, we have no occasion to determine."

In **United States v. Socony-Vacuum Oil Co.**, 310 U.S. 150, 247, this court stated that the action of the trial judge was not reviewable on certain defendants' appeals, "unless they can establish that such action was so clearly prejudicial to them that the denial of their motions constituted a plain abuse of discretion." **United States v. Johnson**, 327 U.S. 106, did not involve a verdict at all, but a trial court's findings of fact.

Petitioner would have this Court say that the decisions of this Court and the Federal Rules of Civil Procedure, mean that a verdict can be taken away repeatedly, without cause, and without appellate supervision, until an adverse verdict is finally returned or pursuit of the cause is abandoned through the exhaustion of determination or financial resources. It is respectfully submitted that this Court will never countenance such a perversion of common sense.

Recognizing that its principal argument is untenable, Petitioner apparently argues that a "clear" or "patent" abuse of discretion is necessary in order to reverse the conditional grant of a new trial. None of the cases cited by Petitioner from other circuits so hold, although the Court of Appeals for the Sixth Circuit uses the terms "abuse of discretion" and "clear abuse of discretion" interchangeably. See e.g., **Duncan v. Duncan**, 377 F.2d 49, 53, 55 (1967). The Eighth Circuit also has cases which use the term "clear" or "patent" abuse of discretion and those which use the term "abuse of discretion." Compare cases cited by Petitioner with **Milprint, Inc. v. Donaldson Chocolate Company**, 222 F.2d 898 (8th Cir. 1955); **Greene v. Werven**, 275 F.2d 134 (8th Cir. 1960); **Century "21" Shows v. Owens**, 400 F.2d 603 (1968).

There is no need for this court to review the action of the court below in reversing the alternative grant of

a new trial as an abuse of discretion since such action is authorized by Rule 50 and, as demonstrated by the opinion below, was entirely appropriate in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted

ROBINS, DAVIS & LYONS

DALE I. LARSON

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Attorneys for Respondents

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-903

AALCO WRECKING COMPANY, INC.,
Petitioner,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation; MILLER'S MUTUAL INSURANCE COMPANY, a Corporation; AMERICAN MOTORISTS INSURANCE COMPANY, a Corporation; NORTHWESTERN MUTUAL INSURANCE COMPANY, a Corporation; PENNSYLVANIA NATIONAL MUTUAL INSURANCE COMPANY, a Corporation; THE GENERAL INSURANCE CORPORATION, a Corporation; and COMMERCIAL UNION INSURANCE COMPANY OF AMERICA, a Corporation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

Respondents' brief in opposition to the Petition for Writ of Certiorari (No. 72-903) misinterprets the question presented to the Court. It is not whether an abuse of discretion in granting a new trial is **immune** from review by the Court of Appeals (Res. Br. p. 2).

I

The rule is that the grant of motion for new trial will not be reviewed and reversed except for a clear abuse of the discretion vested in the trial judge.

The Court of Appeals erroneously reviewed the cause de novo and reversed the grant of a new trial without finding such clear abuse.

The decisions of this Court have not changed that rule. It remains as stated in **Fairmont Glass Works v. Cub Fork Coal Company**, 287 U.S. 474 (Pet. p. 8).

Conflict does exist with respect to the principles of law to be followed when courts of appeal reverse the conditional grant of a new trial by the trial judge. The authorities cited by respondents (Res. Br. p. 6) as allegedly resolving this conflict are not in point. **Lind v. Schenley Industries, Inc.**, 287 F2d 79 (3rd Cir.), cert. denied 364 U.S. 835 (1960); **Berner v. British Commonwealth Pacific Airlines, Ltd.**, 346 F2d 532; and **Duncan v. Duncan**, 377 F2d 49, cert. denied, **Fain v. Duncan**, 389 U.S. 913 (6th Cir.) have no bearing on the case at bar.

The Petition for Writ of Certiorari filed with this Court in **Lind** presented several reasons for the grant thereof, one of which dealt with the reversal by the Third Circuit Court of Appeals of a grant of new trial. The Petition was prepared prior to the amendment of Rule 50 of the Federal Rules of Civil Procedure. It was founded upon the contention that the granting of a new trial by the trial court was an order interlocutory in nature and was therefore not appealable. There existed no question of review of the record de novo in **Lind** (supra). That decision did not impose a new and additional burden upon courts of appeal nor did this Court, by denial of certiorari, touch upon the question presented here.

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In the **Berner** case the trial judge entered an order granting a new trial two years after a jury verdict, and did not specify any reason for the grant thereof. Here the new trial was granted on ten specific grounds.

In the **Duncan** case the Court of Appeals for the Sixth Circuit specifically found that the District Court **clearly** abused its discretion in granting a new trial, and in so doing spelled out in detail where such **clear** abuse had occurred.

II

The decisions of the Eighth Circuit do not allow invasion of the discretion vested in the trial court in the grant of new trial absent more than "abuse of discretion."

Respondents contend that the decisions of the Eighth Circuit condone reversal of the conditional grant of a new trial where the Court of Appeals finds less than "clear" or "patent" abuse of discretion (Resp. Br. p. 7). They cite **Milprint, Inc. v. Donaldson Chocolate Company,** 222 F2d 898, **Greene v. Werven,** 275 F2d 134, and **Century "21" Shows v. Owens,** 400 F2d 603 as authority for that proposition. We disagree.

In **Milprint,** a jury returned a verdict for plaintiff of $2,750.00. The trial court granted plaintiff's Motion to Amend Judgment, or in the Alternative for Partial New Trial, or in the Alternative for New Trial and entered a judgment for $10,179.94. On appeal, it was held that if the District Court had entered an order granting plaintiff a new trial or a partial new trial, it would not have been appealable and could have been reviewed only for an **alleged abuse** of discretion on an appeal from the judgment ultimately entered. There was no review of the record de novo nor were the parameters of abuse of discre-

tion defined. The action of the trial court was reversed for the entry of a judgment in excess of that returned by the jury.

Century "21" Shows held that the question of the excessive size of a verdict is to be considered by the trial judge in a Motion for New Trial, and that a ruling thereon is within his sound discretion. This discretion is not to be disturbed unless its exercise resulted in "plain injustice" or constituted a "monstrous" or "shocking" result.

The **Greene** case likewise imposes the requirement of a finding of more than a mere statement of abuse of discretion upon which to base a reversal of the trial court's action. In that case Mr. Justice Blackmun, writing for the Eighth Circuit, held at page 141:

> "The appellant's claim that the court erred in denying the motion for new trial is of no avail. That motion is directed to the discretion of the trial court and this Court will reverse only where **abuse of that discretion is apparent**" (Emphasis supplied).

There was no finding in the instant cause that the action of the trial court constituted "clear abuse" or that it exceeded the bounds of proper discretion as spelled out in **Altricher v. Shell Oil**, 263 F2d 377 (8th Cir. 1959).

CONCLUSION

The fact remains that the decision entered by the Panel imposes new principles. It imprints upon the Court of Appeals the function of the trial court. This radically different concept so destroys settled principles as to require review by this Court. For the reasons stated in the Peti-

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tion and in this Reply, petitioner prays for review by this Court.

Respectfully submitted

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Certificate of Service

I hereby certify that on the 26th day of January, 1973, three (3) copies of Petitioner's Reply Brief were delivered to Hullverson, Richardson and Hullverson, 722 Chestnut Street, St. Louis, Missouri 63101 and to Adolph K. Schwartz, Suite 800 Locust Building, St. Louis, Missouri 63101 and were mailed airmail, postage prepaid, to Dale I. Larson, c/o Robins, Davis & Lyons, 33 South 5th Street, Minneapolis, Minnesota 55402. I further certify that all parties required to be served have been served.

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